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Nos. 04-1034, 04-1384

DEC 2 - 2005

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN A. RAPANOS, ET AL.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

JUNE CARABELL, ET AL.

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICI CURIAE NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, THE AMERICAN ROAD AND TRANSPORTATION BUILDERS, THE CITY OF VICTORVILLE, CALIFORNIA, AND THE NATIONWIDE PUBLIC PROJECTS COALITION IN SUPPORT OF PETITIONERS

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The National Stone, Sand and Gravel Association, the American Road and Transportation Builders Association, the City of Victorville, California, and the Nationwide Public Projects Coalition, as *amici curiae*, respectfully submit this brief in support of Petitioners John A. Rapanos, et al. and June Carabell, et al.[1]

INTERESTS OF THE AMICI CURIAE

The *Amici* are private entities, public sector agencies and associations, and local governments that provide essential services to the public including flood control and water supply management, construction of vital public infrastructure projects and the production of aggregates that are utilized in construction projects across the county.

On a daily basis, *Amici* are forced to navigate the confusing and ever-changing maze of regulations and policy statements issued by the Army Corps of Engineers in order to determine the answer to what should be a simple question: does a given wetland fall under federal jurisdiction pursuant to the Clean Water Act ("CWA")? Under the current framework, determining the answer to this simple inquiry is exceedingly difficult and, even more troubling for *Amici*, often varies depending on in which part of the Country the wetland is located or which particular agency staff member is consulted. *Amici* firmly believe that the time has come for this Court to provide clear criteria for CWA jurisdiction that

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[1] All parties have consented to the filing of this brief. The *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel have made a monetary contribution to the preparation and submission of this brief.

recognizes the proper limits of federal jurisdiction over non-navigable waters, and eliminates the inconsistency and lack of clarity that has been the hallmark of this area of the law for far too long.

The *Amici* consist of the following:

The National Stone, Sand and Gravel Association ("NSSGA") is a trade association that represents more than 895 members and approximately 120,000 working men and women in the aggregates and related industries. During 2004 alone, a total of more than 2.86 billion metric tons of aggregate materials (crushed stone, sand, and gravel), valued at more than $16 billion, were produced and sold in the United States. NSSGA's members are responsible for over 90 percent of the annual production of crushed stone and over 70 percent of the annual production of sand and gravel in the United States. Due to how aggregates are formed, sand and gravel are often located near or under streams and other wetlands. Consequently, NSSGA's members frequently excavate materials from these areas. The vast majority of these materials are utilized in public infrastructure projects. NSSGA's members also regularly undertake land reclamation activities that include wetland restoration, creation and enhancement, as well as flood storage enhancement.

The American Road and Transportation Builders Association ("ARTBA"), is made up of more than 5,000 member organizations in the transportation construction industry, including construction contractors, professional engineering firms, federal, state and local transportation administrators, heavy equipment manufacturers, and materials suppliers. These member companies employ more than 2.5 million people in the transportation construction industry in the United States. ARTBA's members are responsible for construction of vital public infrastructure

projects such as highways, bridges, airports, railroads, and mass transit facilities.

The City of Victorville, California has a population of approximately 78,000 and is located approximately 97 miles Northeast of Los Angeles and 35 miles Northeast of San Bernardino at the edge of the Mojave Desert. The Southern California Logistics Airport ("SCLA"), formerly the George Air Force Base, is located in the City and has become the primary focus of the City's development plans. The City is located within the Mojave River Watershed in the high desert region of Southern California. The Mojave River, the primary source of surface water for the basin, is normally dry, except for a small stretch of perennial flow and periods of flow after intense storms. The Mojave River actually flows underground for much of its 120 miles. The City is very concerned that, if the Court upholds the Sixth Circuit's decisions below, normally dry desert washes found in the Mojave River basin that are wet only after intense storms would be considered "Waters of the United States." Such expanded jurisdiction could have a severe impact on the expansion of the SCLA and other development projects, including manufacturing and industrial production, as well as public infrastructure projects that are vital to the City's economic growth and integral to the City's long-term growth plans.

The Nationwide Public Projects Coalition ("NPPC") is a not-for-profit association that is made up of regional and local government agencies that are involved in water supply, flood control, irrigation, wastewater and stormwater management, street and highway construction and maintenance, aggregate mining, and environmental quality amenities. These agencies represent over 12 million constituents, extending from Connecticut to California and from Alaska to Georgia. NPPC works on behalf of members of the public to ensure that vital public infrastructure services

are provided in a safe, timely and environmentally-beneficial fashion. Consisting of public agencies and firms that provide vital infrastructure and services, NPPC's members must ensure that a responsible balance is achieved between environmental, health, and safety goals and the protection of human lives and property. NPPC's members are typified by the following agencies:

The West Valley Water District of Rialto, California ("WVWD") is an independent special district that serves water customers living in southwestern San Bernardino County and northern Riverside County. WVWD depends on local surface water resources, five groundwater basins and the California State Water Project to meet the needs of more than 50,000 persons.

The Metropolitan Denver Water Authority of Littleton, Colorado ("MDWA") is a political subdivision and public corporation of the State of Colorado. MDWA is made up of twenty cities and special districts that provide municipal water and/or wastewater services for the Metropolitan Denver area and serve more than 1.5 million persons. MDWA's member agencies serve some of the fastest-growing counties in the nation.

The Semitropic Water Storage District of Wasco, California ("SWSD") supplies agricultural water for more than 140,000 irrigated acres of growing crops such as alfalfa, cotton, nuts, vegetables, grains and grapes. SWSD operates one of the largest groundwater storage projects in the world, and help meet the drought-year needs of more than 20 million California residents.

The Cobb County-Marietta Water Authority ("CCMWA") is a political subdivision of the State of Georgia. CCMWA is a regional water wholesaler that supplies water to municipalities and counties serving more than 780,000 people in the rapidly growing Metro-Atlanta area. Included are all of Cobb County and its municipalities, all of Paulding County, and portions of Douglas County, Cherokee County and Fulton County.

The Wheeler Ridge-Maricopa Water Storage District of California ("WRMWSD") is a political subdivision of the state of California whose jurisdiction encompasses approximately 147,000 acres of land in Kern County, at the extreme southern end of the San Joaquin Valley and south of Bakersfield. Most of the District's water supply is obtained via the California Aqueduct from the State Water Project. More than 20 different crops are grown within the District.

SUMMARY OF ARGUMENT

1) The expansive jurisdictional approach urged by the Government and adopted by the Sixth Circuit below runs counter to this Court's clear guidance in Solid Waste Agency v. United States Army Corps of Engineers, 531 U.S. 159 (2001) that the CWA requires a showing of a "significant nexus" to navigable waters in order to assert jurisdiction. The lack of clear guidance and the inconsistent interpretation by various Army Corps of Engineers districts have created substantial confusion and uncertainty for the public works community making it difficult to deliver materials and to construct essential public works projects, such as flood control, in a timely fashion.

2) Contrary to the Sixth Circuit's ruling endorsing the "migratory molecule" test, "significant nexus" must constitute more that a mere tenuous hydrologic connection. *Amici* submit there must be credible evidence of: (a) a direct, discrete and defined surface hydrologic connection to a navigable water; and (2) a demonstration that a discharge into such a connected water has a substantial injurious impact on the water quality of the navigable water, applying the principles of proximate causation and forseeability set forth by this Court in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

3) The Sixth Circuit's broad interpretation of CWA jurisdiction violates the fundamental principle of federalism that, absent a "clear statement" from Congress, a reviewing court should not sanction usurpation of State and local control of land and water resources. Affirming the Sixth Circuit's decisions would upset the delicate balance between regulation under the CWA and regulation under water pollution programs at the State and local level, which typically are far broader than their federal counterparts.

ARGUMENT

I. THE EXPANSIVE JURISDICTIONAL APPROACH URGED BY THE GOVERNMENT AND ALREADY ADOPTED IN SOME AREAS OF THE COUNTRY BY THE ARMY CORPS OF ENGINEERS HAS RESULTED IN INCONSISTENCY AND CONFUSION AND HAS DONE SIGNIFICANT HARM TO THE PUBLIC PROJECTS COMMUNITY.

A. The Lack Of Clear And Consistent Guidance Over The Scope Of CWA Geographic Jurisdiction Has Created Confusion In The Regulated Community

Despite this Court's guidance in Solid Waste Agency v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"), the U.S. Army Corps of Engineers ("Corps") has continued to assert CWA jurisdiction over wet areas that have the most remote, if any, hydrologic connection to navigable waters. The Corps's expansive and often inconsistent interpretation of the CWA has been enabled by a lack of clear guidance from the lower federal courts, which have disagreed over the correct interpretation of SWANCC. Complicating matters further, several regional offices of the United States Environmental Protection Agency[2] ("EPA") and divisions of the Corps straddle two or more Circuits that have arrived at opposing conclusions regarding CWA jurisdiction in the wake of SWANCC. As a result, it is often incumbent upon individual regulators to make sense of competing legal standards depending upon where a particular project or parcel happens to lie.

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[2] A 1979 Opinion of the Attorney General determined that EPA has the ultimate authority for determining the extent of CWA jurisdiction. See 43 Op. Att'y Gen. 15 (1979). The Corps and EPA, however, entered into a memorandum of agreement in 1989 that accords the Corps primary authority to determine the scope of geographical jurisdiction under the CWA. See Margaret N. Strand, Wetlands Deskbook, (2d ed. 1997) (Mem. of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989)).

In the confusion that has followed SWANCC, *Amici* have found it difficult to predict when the Corps will assert jurisdiction over isolated and ephemerally wet areas and thereby force *Amici* into the time-consuming and expensive permitting process. The reigning confusion over the proper jurisdictional reach of the CWA in the wake of SWANCC has had a chilling effect on public projects by allowing the Corps and the EPA to interfere with carefully considered decisions and investments of state and local governments that are intended to meet vital public needs, including life saving infrastructure.

For example, sand and gravel pits, settling ponds related to sand and gravel operations, and ditches along rail lines made from borrowing material to build the railway berm have been claimed by the Corps as jurisdictional. In other circumstances, the mere presence of a 100-year flood plain has led to speculation about a potential hydrological connection that is adjudged sufficient to declare a wetland as jurisdictional. In other cases, wetlands have been claimed by the Corp as "adjacent" due to the presence of man-made conveyances. No mention of a determinable distance between a wetland and navigable water has ever been dictated to assert the difference between "adjacent" and "isolated" wetlands. As a result, many aggregate mining operations and road construction companies must participate in the lengthy and complex Section 404 permitting process.

Moreover, stormwater management agencies generally require access to wetlands and streams and other areas that are seasonally wet due to collection of rainwater. Depending on whether such areas are within federal jurisdiction, these agencies may be required to obtain permits from the Corps to conduct basic, but important, maintenance functions such as cleaning debris basins and clearing vegetation and other obstructions that choke flood control channels. Such activities are critical to maintaining the

maximum capacity and proper functioning of the flood control systems during major flood events.

The current state of confusion amongst the regulated community has been well documented in a February 2004 report issued by the United States General Accounting Office ("GAO") that reviewed the problems in the Corps's jurisdictional determination process in the wake of this Court's decision in SWANCC. Among other findings, the GAO noted that the Corps has been utilizing "vague" language to make jurisdiction determinations and has been forced to rely "on the key terms in the regulatory definitions of waters of the United Sates which [have] not been well defined." United States General Accounting Office, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO-04-297 at 26. The result, the GAO found, has been "confusion in the districts" and "differences in jurisdictional determination practices among Corps districts. . . . " Id.

The concerns voiced in the GAO's report have been confirmed and amplified in a survey conducted by NSSGA of its members seeking information about the state of the CWA jurisdictional regulations as they are being applied in the wake of SWANCC. The survey asked respondents to describe the jurisdictional tests that Corps personnel were using to evaluate wetlands, including separate questions regarding the use by field personnel of groundwater, man-made conveyances and the 100-year floodplain to establish jurisdiction. The results of the survey reveal a gross inconsistency of implementation that is at best unpredictable and at worst, indecipherable.

The following are a few examples of survey responses demonstrating the inconsistent approaches currently being used by Corps field personnel:

- "The Corps has required fill permits for wetlands adjacent to streams (a stream is anything that is a blue line on a topo[graphical] map)." (CA)

- "[The Corps] chose to assert jurisdiction because of a man-made ditch that drained the isolated wetland. The ditch was dry but the Corps claimed a groundwater connection." (NY)

- "In one permit where there was a hydrologic connection with the wetland via a large drainage ditch, they still claimed no permit required. " (FL)

- "[T]he Corps will make an assessment . . . to determine if a specific intermittent stream has a surface flow all the way to the tributary or interstate water at least every other year." (CO)

- "At present, the mere presence of a 100-year flood plain and the absence of two barriers to prevent wetland waters from reaching the navigable waters are sufficient criteria to name the wetland as jurisdictional." (SC)

- "The Charleston District uses a combination of distance from the navigable waters to the isolated wetlands and any connection such as a ditch to assert jurisdiction." (SC)

- "No distinction is made by the Corps between natural and man-made conveyances in their assertion of jurisdiction . . . There is no distance threshold between an "isolated" wetland and a navigable water." (CO)

- "Every swale and abandoned agricultural drainage ditch was subjected to jurisdiction." (VA)

- Sand and gravel pits, settling ponds related to sand and gravel operations, and ditches along rail lines made from borrowing material to build the railway berm have been asserted by the Corps as jurisdictional. (TX)

- The presence of a 100-year floodplain has been used to assert jurisdiction on tributaries and isolated wetlands. Ephemeral and intermittent waterways are considered jurisdictional by the Corps if they can be tied to a navigable waterway and exhibit an ordinary high water mark ("OHWM") (TX).

The responses to the NSSGA survey leave the reader with nothing but a tangible sense of confusion. A blue line on a topographical map is jurisdictional; perhaps an OHWM is required, or a groundwater connection, or a flow which occurs every other year. A ditch may draw a jurisdictional connection, or it may not. Nothing is covered. Everything is covered. This is an unsustainable regulatory environment under which to responsibly run a business.

It is vitally important that this Court reaffirm the limited jurisdiction of the federal government under the CWA and provide the Corps with clear jurisdictional criteria. Such a ruling will go a long way toward providing *Amici's* diverse membership with the certainty and predictability that has long been lacking in wetlands permitting, and will ensure that *Amici* can continue to provide their vitally important services to the public at large.

B. Adoption Of The Mere Hydrological Connection Or The "Migratory Molecule" Standards Urged By The Government And Adopted By The Sixth Circuit In Rapanos And Carabell Would Have Severe Consequences For The Public Works Community

While the *Amici* desperately need a certain and consistent approach to the assertion of federal jurisdiction under the CWA, it is equally important to the *Amici* that the approach adopted by this Court is rooted in the CWA and recognizes the limitations of federal jurisdiction over wetlands and waters that are far removed from traditionally navigable waterways.

Under the "migratory molecule" test espoused by the Government and adopted by the Sixth Circuit in Rapanos and Carabell, every isolated wetland with even the most tenuous and fleeting of connections to a navigable water will be subject to federal jurisdiction under the CWA if one molecule of water from the wetland eventually reaches, or could potentially reach, a navigable water. Such a test would have a severe impact upon the *Amici*, as virtually every project that occurs in wet terrain would be swept into the CWA, with the resulting costs and delays of the Section 404 permitting process. Such expansion of the 404 permitting process is not only burdensome, but contrary to the intent of CWA.

Whether or not a 404 permit is required has a huge impact on the expense and timeframe of public projects, as *Amici* often face great costs and significant delays under the 404 program. A 1999 survey indicates that it takes an average of 788 days to process an individual permit under Section 404 at an average cost in excess of $270,000 per

application.[3]

This delay and expense is particularly troublesome in the wake of the unprecedented damage wrought by the 2005 hurricane season. As a result of storms like Hurricane Katrina, the demand for new public infrastructure is immense. In Louisiana alone, more than $32.6 billion has been requested to rebuild the state's transportation infrastructure and hurricane defenses. See Testimony provided to Committee of Transportation and Infrastructure: Before Subcomm. on Highways, Transit, and Pipelines, 109th Cong. (2005) (statement of Johnny B. Bradberry, Secretary of Louisiana Department of Transportation and Development) at 2 (available online at http://www.house.gov/transportation/highway/10-27-05/bradberry.pdf) Clear criteria defining "substantial nexus" will help ensure that these critical projects are not impeded by the confusion and uncertainty that currently exists as to what is and what is not a regulated water of the United States under the CWA.

In addition to the broad national implications of this overreach, the process of aggregate mining itself demonstrates the "real world" consequences of the Sixth Circuit's ruling. For example, NSSGA member Martin Marietta Aggregates constructed a dam which created a pond at its Appling Quarry, in Columbia County, Georgia for sedimentation control, water supply and final treatment of process water — necessary aspects of such mining. Discharges from the pond into a nearby creek were permitted under a CWA Section 402 NPDES permit issued by the State

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[3] See David L. Sunding and David Zilberman, The Economics of Environmental Regulation by Licensing, An Assessment of Recent Changes to the Wetlands Permitting Process, Natural Resources Journal, Winter 2002, at pp. 9-10

of Georgia and the Corps determined that the pond was not subject to the jurisdiction of the Corps under section 404 of the CWA. Despite the fact that the non-jurisdictional pond cut off any surface flow from wetlands and waters upstream of the pond to the downstream creek and that any discharges from the pond itself complied with the NPDES permit and would not violate water quality standards in the creek, the Corps still asserted jurisdiction over those wetlands and waters. The Corps based its decision on the theory that the construction of the pond did not cut off any pre-existing continuous surface water connection between the upstream wetlands and waters and other downstream jurisdictional waters that eventually flowed into the navigable waters. Martin Marietta filed an administrative appeal contesting the Corps jurisdiction. The case was eventually remanded by a federal court to the Corps and the issue remains unresolved two years after the administrative appeal was filed.[4] This is but one example of the kind of overreach that the Sixth Circuit's ruling would sanction should that decision be upheld by the Court.

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[4] See Martin Marietta Materials Inc. v. U.S. Army Corps of Engineers, CV 104-146 (S.D. Ga., April 13, 2005).

II. THE REQUISITE "SIGNIFICANT NEXUS" BETWEEN A NON-NAVIGABLE WETLAND AND A NAVIGABLE-IN-FACT WATER CAN ONLY BE ESTABLISHED BY PROOF OF A SIGNIFICANT HYDROLOGICAL CONNECTION AND EVIDENCE THAT POLLUTANTS DISCHARGED INTO THE WETLAND WOULD BE HARMFUL TO THE CHEMICAL, PHYSICAL, OR BIOLOGICAL INTEGRITY OF THE NAVIGABLE WATER

Prior decisions of this Court make clear that unless a wetland or water is directly adjacent to a navigable water, there must be a "significant nexus" between the isolated wetland and a water that is navigable-in-fact. The lower courts (and the Corps for that matter), however, have struggled to determine what constitutes the necessary "significant nexus." This difficulty has had a profound effect on *Amici* and the public they serve through inconsistent and confusing jurisdictional determinations.

This Court's opinion in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), cannot justify the overbroad assertion of jurisdiction by the Sixth Circuit and other lower courts. There, the Court found CWA jurisdiction only over non-navigable adjacent wetlands that actually abutted a navigable waterway. The Court reasoned that the fact that such wetlands were "inseparably bound up" with the navigable water provided an adequate "legal judgment" that they too were jurisdictional. 474 U.S. at 134. This judgment was based on evidence that the adjacent wetlands have significant effects on water quality and the aquatic ecosystem of the adjacent waterways. Id. at 135. The Court, however, specifically did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . ." Id. at 131-132, n.8.

Nor is SWANCC just a very narrow ruling on the "migratory bird" test. Rather, in excluding a particular non-adjacent, isolated pond from CWA jurisdiction, the Court stressed the importance of establishing a nexus to traditionally navigable waters (defined in relevant part as "those waters that are subject to the ebb and flow of the tide, or have been use in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4). That is, the "term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made." Id. at 172. The Court clarified that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in Riverside Bayview Homes." SWANCC, 531 U.S. at 167. Thus, the true question before this Court is how to define the parameters of the requisite "significant nexus."

Amici submit that this "significant nexus" must constitute more than a mere hydrological connection. In order to be true to the statute, the significant nexus ought to meet two factors. There must be credible evidence of: (1) a direct, discrete and defined surface hydrological connection to a navigable water (based on Congress's limited power over navigation, 33 U.S.C. §§ 1344(a), 1362(7)); and (2) a demonstration that a discharge into that "connected" water has a substantial injurious impact on the water quality of navigable water (based on the CWA's stated purpose of protection of the chemical, physical, and biological integrity of the Nation's waters, 33 U.S.C. § 1251(a) (2000)).

In their struggle to define what constitutes a "significant nexus" many courts have settled for the Corps providing any sort of hydrological connection, even in the absence of evidence that water from the non-navigable area actually reaches the navigable water. See, e.g. United States

v. Rueth Development Co., 335 F.3d 598 (7th Cir. 2003) and United States v. Deaton, 332 F.3d 698 (4th Cir. 2003). Yet, as explained by the Fifth Circuit, a definition of "navigable waters" that would include all waters that have any hydrological connection with "navigable water" is "unsustainable under SWANCC." In re Needham, 354 F.3d 340 (5th Cir. 2003).

A. The Extension Of CWA Jurisdiction To Waters That Have Only An Intermittent, Indirect, Tenuous Or Remote Hydrological Connection To Navigable Waters Exceeds The Corps's Authority Under The CWA

In Rueth, the district court reasoned that if "a molecule" of water from the disputed wetland eventually intermingles with the molecules of a navigable water, the Corps has jurisdiction: "A drop of rainwater landing in the Site is certain to intermingle with water from the Little Calumet River . . . the Site, therefore, has the 'significant nexus' to a navigable waterway [required by SWANCC]." Rueth, 189 F. Supp. 2d 874, 878. This "migratory molecule" theory, which is perhaps the most extreme and aggressive construction of the Corps's authority acknowledged in the wake of SWANCC, has already spread to other courts, including the Fourth Circuit in Deaton.[5]

Staking CWA jurisdiction upon an indirect, tenuous

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[5] The Fourth Circuit in Deaton, while showing respect for the notion that there must be at least a hydrologic connection, did not require the connection to be significant, allowing for regulation if a drop of water could potentially end up in the navigable water no matter how far this molecule would migrate and regardless of the path it would take. Deaton, 332 F.3d at 714.

hydrological connection quite simply ignores the clear import of SWANCC. A "significant nexus" constitutes more than a mere hydrological connection or "migratory molecule" but rather should require the Corps to establish that there is a discernable, discrete and uninterrupted surface water connection between the wetlands and/or "wet" area involved and a navigable-in-fact water. "Consequently, . . . the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like." Needham, 354 F.3d. at 345.

Amici submit that asserting CWA jurisdiction based upon an intermittent, remote or indirect connection to a navigable water -- without any consideration of the connection between a given discharge and the water quality of the navigable water -- expands CWA jurisdiction well beyond the limits set by Congress. "Significant nexus" requires limiting principles because, if an indirect connection is enough to create jurisdiction, then the Corps will have jurisdiction over practically every drop of water anywhere in the nation, unless that drop of water is caught in a jar as rainfall from the sky.[6] *Amici* submit that, in determining if a discrete hydrologic connection exists, evidence of one or more of the following criteria should apply:

First, non-navigable waters should not be determined to be connected "navigable waters" by virtue of some temporary, artificial and reversible man-made conveyance, such as a ditch, swale, pipe, storm drain or similar manipulation. The Eastern District Court of Virginia recognized this problem in United States v. Newdunn

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[6] Justice Stevens, dissenting in SWANCC, noted that most wetlands designated as "isolated" in fact have some degree of hydrological connection to the surrounding water system. SWANCC, 531 U.S. at 176, n.2.

Associates, 195 F. Supp. 2d 751 (E.D. Va. 2002); rev'd, Treacy v. Newdunn Associates, 344 F.3d. 407 (4th Cir. 2003). In rejecting Corps jurisdiction over a wetland site connected to navigable water by a series of swales and drainage culverts, the court noted that defining a storm drain as a tributary would unreasonably expand Corps jurisdiction because any property connected to a storm drain system could be regulated (presuming that water discharged into a storm drain eventually found its way to navigable water somewhere down its path). Moreover, allowing for use of man-made tributaries when calculating the reach of jurisdiction creates jurisdiction that shifts whenever a new culvert is laid or removed. Id. at 765 ("wetlands could alternately become jurisdictional or non-jurisdictional in tandem with adjacent road and storm drainage construction.")

Second, a wetland or pond created in uplands for various purposes such as sediment control should not be considered jurisdictional absent a clear surface connection to a navigable water. For example, members of NSSGA often create surface mining pits in uplands as settling basins for materials excavated during aggregate mining. Such basins must be reclaimed under state law and cannot be simply "abandoned" when the mining ceases. However, while, the Corps concedes that waters of the United States does not include "pits excavated in dry lands for the purpose of obtaining fill, sand or gravel, unless or until the construction or excavation is abandoned," the agency "reserves the right on a case-by-case basis to determine that a particular water body within these categories of waters is a water of the United States." 51 Fed. Reg. 41206, 41217 (1986). Such waters, by definition, cannot be part of a "connected" tributary system during mining and should also be excluded after mining ceases and reclamation is completed without clear evidence that they have become "inseparably" linked to

navigable waters via a natural surface channel.

Third, "wet" spots such as vernal pools, ephemeral[7] areas that pond after rain events, mud puddles, indistinct depressions and farm ditches that lack any evidence of continuous surface flow to navigable waters should not be considered jurisdictional. An acceptable indicator of surface flow between the "wet area" and the navigable water might include a continuous "ordinary high water mark" ("OHWM").[8] However, manmade structures should be considered in assessing whether regular flow has been interrupted and can prevent establishment of an OHWM. For example, a wetland adjacent to a ditch where that ditch follows an indistinct path to a navigable water interrupted by uplands and manmade structures would not have the requisite substantial nexus to that navigable water. In United States v. RGM Corp., 222 F. Supp. 2d 780 (E.D. Va. 2002), the court rejected the suggestion that manmade

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[7] The Corps defines "ephemeral streams" as having "flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow." 65 Fed. Reg. 12818, 12897 (March 9, 2000). This lack of a continuous flow does not comply with "significant nexus" principles laid out in SWANCC.

[8] The term "ordinary high water mark" is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(e).

obstacles, such as catch basins and culverts, are not considered interruptions of a continuous OHWM, noting that the Corps engages in circular logic by relying on manmade features (such as ditches) to assert the presence of a continuous hydrological connection, while attempting to disavow their presence when they interrupt the connection. Id. at 788.

Fourth, ground water alone should not create a hydrologic connection, unless the wetland connected by groundwater is directly abutting a navigable water so as to be "inseparably bound up" with that water (as in Riverside Bayview). As the Fifth Circuit explained in Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001), it would be an unwarranted expansion of the CWA to conclude that a discharge that migrates into a navigable water via natural groundwater seepage could become a "discharge" into a navigable water. Id. at 271 (Congress was aware of the connection between groundwater and surface water but nonetheless decided to leave groundwater unregulated under the CWA).

B. Evidence Of Significant Impact To The Water Quality Of A Navigable Water Is Necessary To Demonstrate That A Non-Navigable Water Is "Inseparably Bound Up" With A Navigable Water

Amici are concerned that in requiring merely an indirect hydrological connection, the courts lose sight of the underlying purpose that Congress sought to achieve in enacting the CWA. The connection must not only be direct but there must be evidence that the pollutants discharged into the "connected" water will eventually discharge into and "significantly" impair the water quality of the navigable water. Congress passed the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and

biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2000). Hence, where the discharge of the pollutant will not have a "significant" impact on a navigable water that is hydrologically connected, there is no "substantial nexus."

The district court in Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002), correctly required a showing by the Corps that "navigable[-in-fact] waters [were] impacted by Defendant's activities," in order for those activities to be regulated under the CWA. 190 F. Supp. 2d at 1017. The analysis of the District Court of New Jersey in FD & P Enterprises, Inc. v. United States Army Corps of Engineers, 239 F. Supp. 2d 509 (D.N.J. 2003) is also instructive. In FD & P the court analyzed the differing interpretations of SWANCC, and held that after SWANCC "the 'hydrological connection' test is no longer the valid mode of analysis." Id. at 516. Rather, the court held that the Corps must demonstrate evidence of "substantial injurious impact" to a navigable water – which goes "beyond a mere hydrological connection." Id. According to the court, the question of whether there is a "substantial nexus" turns on whether "filling of the wetlands will have a substantial injurious impact upon the chemical, physical and/or biological integrity of the [navigable waterway]." Id. at 517. Applying this test, the FD & P court denied the Corps's motion for summary judgment despite the Agency's broad assertions that "the filling of the wetlands would have an injurious impact on the River by increasing the sediments and chemicals flowing into the River....and would displace flood storage capacity." The court noted that the contrary factual claims of F D & P created a genuine issue of material fact as to whether there is a "substantial nexus" between the wetlands and the Hackensack River.

These decisions are consistent with the Fifth Circuit's analysis in Rice, which held that there must be "a close, direct and proximate link" between the discharge of a

pollutant in the non-navigable water and any resulting actual, identifiable impact to natural surface water. Rice, 250 F.3d at 272. Further, as the Second Circuit recently held, the simple "potential" for a discharge is not enough to regulate the underlying activity Water Keeper Alliance v. US EPA, 399 F.3d 486, 505 (2d Cir. 2005) (explaining that the CWA "gives the EPA jurisdiction to regulate and control only actual discharges – not potential discharges, and certainly not point sources themselves").

Principles developed by Justice O'Connor in her concurring opinion in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 708-14 (1995) (O'Connor, J., concurring), provide a good framework for analysis in determining whether a discharge would have a "substantial injurious impact" to navigable waters. In Sweet Home, the Court addressed a US Fish and Wildlife Service rule that determined whether "habitat modification" would result in a Section 9 "take" of species listed as "endangered" under the Endangered Species Act. See 16 U.S.C. § 1538. In agreeing with the majority that "significant habitat modification must cause actual, as opposed to hypothetical or speculative, death or injury" to protected species, Justice O'Connor noted that such a test implicates "ordinary principles of proximate causation, which introduce notions of foreseeability." Id. at 709 (O'Connor, J., concurring).

More recently, this Court in Department of Transportation v. Public Citizen, 541 U.S. 752 (2004), embraced a similar principle of "proximate causation" in the context of the agency's underlying authority. In finding that the National Environmental Policy Act ("NEPA") did not require the Federal Motor Carrier Safety Administration ("FMCSA") to consider the environmental effects arising from the entry of Mexican trucks as a result of the President's lifting or modification of the moratorium against such entries, this Court found it significant that the FMCSA

lacked discretion to prevent such operations. Id. at 766. Consequently, the Court held that, the "but for" test of causation was "insufficient to make the agency responsible for a particular environmental effect under NEPA and the relevant regulations." Id. at 767.

These principles of proximate causation and notions of forseeability, consistent with an agency's underlying authority to act, can similarly be applied to discharges under the CWA in determining "substantial injurious effects" to navigable waters. For example, evidence that an oil or chemical discharge into a "connected" tributary would actually reach the navigable water might be sufficient to establish jurisdiction over the discharge. However, evidence that filling an isolated (tenuously connected) wetland that would not foreseeably and substantially impair the functions of a navigable water several miles away, should be enough to preclude jurisdiction over the discharge activity. While the exact nature and extent of the evidence needed to establish such a causal linkage may vary from case to case, such a test will put an end to the Corps and EPA's presumption that any filling of wetlands or discharge of pollutants is automatically subject to CWA jurisdiction due to the interconnected nature of all aquatic systems.

III. THE SIXTH CIRCUIT'S BROAD INTERPRETATION OF "NAVIGABLE WATERS" VIOLATES THE FUNDAMENTAL PRINCIPLE OF FEDERALISM THAT ABSENT A "CLEAR STATEMENT" FROM CONGRESS, A REVIEWING COURT SHOULD NOT SANCTION USURPATION OF STATE AND LOCAL CONTROL OF LAND AND WATER RESOURCES

By federalizing any wet area, no matter how remote from navigable waters, the Sixth Circuit adopted an

unprecedentedly broad interpretation of the geographic scope of CWA jurisdiction. As this Court held in SWANCC, the courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources absent a "clear statement from Congress" that such a result was intended. 531 U.S. at 174. In enacting the CWA, Congress did not seek to impinge upon the States' traditional and primary power over land and water use when setting out the scope of jurisdiction under the CWA.

One of the principal tenets of federalism is that courts shall not interpret federal legislation to abrogate local power unless it is clear that Congress considered and intended, when it passed the authorizing legislation, to alter the traditional balance between federal and state powers. This "clear statement" principle applies "in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter, J., dissenting) (citation omitted). In cases where a court seeks to invoke the outer limits of Congress's power, there must be a clear indication that Congress intended that result. See SWANCC, 531 U.S. at 172. Indeed, this Court has recognized that there is an underlying assumption that the power to legislate in areas traditionally regulated by the States "is an extraordinary power . . . . [that] Congress does not exercise lightly." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

A. Nothing In The CWA Evinces A Clear Statement That Congress Intended To Encroach Upon Local Regulation of Activities That Do Not Add Pollutants to Navigable Waters

Of course, as long as Congress is acting pursuant to one of its enumerated powers, the Supremacy Clause of the Constitution permits Congress to trump state law, even in

areas (such as land and water use) that by tradition fall within the state sphere. Nonetheless, under the "clear statement" principle, courts must not simply assume that Congress has used its power to override state authority. See SWANCC, 531 U.S. at 172-73. Rather, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." United States v. Bass, 404 U.S. 336, 349 (1971). Mere ambiguity will not suffice to demonstrate that Congress intended to intrude into state interests. See Gregory, 501 U.S. at 464.

The Sixth Circuit's expansion of CWA jurisdiction beyond waters with a "substantial nexus" to navigable waters will clearly upset the "cooperative federalism" inherent in the CWA. Section 101 of the CWA specifically limits the authority of federal agencies to intrude into state and local matters:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . .

33 U.S.C. § 1251(b) (2000). Congress also explicitly stated that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." Id. § 1370(2) (2000).[9]

A review of the plain language of the CWA provides

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[9] See also 33 U.S.C. § 1288 (2000) (encouraging states to develop area-wide management plans).

nothing approaching a "clear statement" from Congress that it intended CWA jurisdiction to extend to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote. In truth, far from being "unmistakably clear" that Congress intended the statutory term "water of the United States" to encompass every wet spot, Congress set forth the very specific limit that water must be "navigable" in order to fall within the scope of the CWA. The "waters" that the Sixth Circuit would have regulated are more properly addressed under the state and local land use processes. This careful balance between state and federal power should not be upset.

B. The Sixth Circuit Would Upset The Delicate Balance Between The CWA And Comprehensive State And Local Programs For Controlling Water Pollution

Amici recognize the legitimate objective of the CWA to protect the Nation's waters. However, the CWA does not extend federal authority to all wetlands and waters in the Nation. Fundamental principles of federalism dictate that control of land use decisions are properly within the purview of State and local governments. Indeed, the Court has recognized that "regulation of land use is perhaps the quintessential state activity." See Fed. Energy Regulatory Comm'n v. Miss., 456 U.S. 742, 767 n.30 (1980). As discussed above, the CWA bestows "primary" responsibility upon the States to protect water resources. The literally thousands of State and local governments that regulate wetlands and waters firmly establishes that the States have enthusiastically assumed this role.[10]

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[10] See Federal Wetland Protection Policy, 1993: Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries

State and local governments throughout the Nation have passed comprehensive wetland laws, many of which are broader in scope than the CWA and provide far greater protection. In fact, several states began regulating these areas well before the federal government. "The first wetlands protection statute in the United States was passed in Massachusetts in 1963. . . . By the time Congress enacted the CWA in 1972, Massachusetts had nine years of experience regulating wetlands, and was already reforming its laws to provide greater local control and accountability while maintaining state-level oversight." Jonathan H. Adler, Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation, 29 Envtr. L. 1, 48 (1999).

State-based clean water laws are typically far broader than their federal counterpart – regulating a broader scope of waters. Maryland is an excellent example of a state that has regulatory regime that goes beyond the 404 program, having enacted one of the first laws declaring a goal of "no net overall loss in nontidal wetland acreage and function and to strive for a net resource gain in nontidal wetlands over present conditions." See MD Code. Ann. Envir. Sect. 5- 902 (1996). The Maryland law covers "both surface and underground waters within the boundaries of the state." MD. Code Ann., Envir. Sec. 5-102. In turn, California's Porter-Cologne Water Quality Control Act broadly defines "waters of the State" as "any surface water or groundwater, including saline waters, within the boundaries of the state." Cal. Water

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and Wildlife of the Senate Comm. on Environment and Public Works, 103d Cong., 1st Sess. (1993) (statement of National Association of State Departments of Agriculture), available in LEXIS, Legis Library, Cngtst File (noting that over 5,000 local governments have adopted wetland protection regulations).

Code Sec. 13050.

Well aware of the comprehensive state-based initiatives discussed above, the EPA has also recognized the essential role played by the States in the protection of wetlands and other waters even as to the permitting of point source discharges, explaining:

> More than a dozen States already are currently administering aquatic resources/wetlands protection programs similar to the Federal Section 404 program. This makes sense because State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with the local resources, issues, and needs than are Federal regulators.[11]

The Sixth Circuit's expansive interpretation of jurisdiction under the CWA threatens to displace the important role played by the States in the regulation of their aquatic resources. Because such an outcome was never intended by Congress, this Court should reverse the Sixth Circuit's decisions below.

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[11] USEPA Office of Wetlands, Oceans, and Watersheds, State or Tribal Assumption of the Section 404 Permit Program (May 25, 1999) available online at http://www.epa.gov/owow/wetlands/facts/fact23.html.

CONCLUSION

Amici respectfully request this Court to reverse the Sixth Circuit's rulings and provide clear limiting principles in determining the reach of jurisdiction under the Clean Water Act.

Respectfully Submitted,

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